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ORIGINAL

No. 90-7435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Charles L. Kerr*
Ann M. Parrent
Laura Hastings
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

-and-

John P. Batson
303 10th Street
Augusta, Georgia 30901
(404) 722-8191

Attorneys for Petitioner
James Lee Spencer

* Counsel of Record

May 13, 1991

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Pursuant to Supreme Court Rule 15.6, petitioner James Lee Spencer submits this reply brief to address the arguments first raised in Respondent's Brief in Opposition to Mr. Spencer's petition for certiorari to the Supreme Court of Georgia.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN GEORGIA'S VERDICT IMPEACHMENT RULE AND PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Spencer's petition requests that this Court grant certiorari to decide whether Georgia's verdict impeachment rule may be applied to bar Mr. Spencer's McCleskey claim or to impose an almost insurmountable evidentiary barrier to a capital defendant's ability to prove that his conviction and sentence were unconstitutionally tainted by racial considerations. Petition at 10-18. Respondent's opposition for the most part simply recites the rationale of the Georgia Supreme Court's decision and ignores the issue Mr. Spencer is asking this Court to review. To the extent that respondent urges new grounds not relied on by the Georgia Supreme Court, these points do not present any reason for the Court to decline to grant certiorari in this case.

Respondent first contends that consideration of the juror affidavit presented by Mr. Spencer in support of his constitutional claims was unwarranted because Mr. Spencer was tried by a jury of six blacks and six whites. Brief in Opposition at 15, 20. This point is simply immaterial to the issue presented for review. The juror affidavit shows that racial bias affected at least two jurors' decisions to convict and sentence Mr. Spencer to death. The fact that

six of the remaining jurors were black does not somehow cure this constitutionally forbidden effect.

Respondent also contends that the juror affidavit may be disregarded because the jury found three statutory aggravating circumstances. Brief in Opposition at 15, 20. This point is also without merit. This Court has recognized that racial prejudice in the form of preconceived notions about blacks in general may improperly influence a juror to find aggravating circumstances in the case of a black defendant. Turner v. Murray, 476 U.S. 28, 35 (1986). It is certainly likely, based on the juror affidavit presented here, that such an improper influence operated in this case.

Moreover, respondent's recital of the aggravating circumstances completely ignores the likely effect of racial prejudice on the other phases of the sentencing process. As this Court recognized in Turner, a juror harboring racial prejudice may be less favorably inclined than an unbiased juror toward a defendant's evidence of mitigating circumstances. Id. Most importantly, racial prejudice may influence the juror's exercise of his discretion in the ultimate decision to sentence the defendant to death. Id. ("Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty."). Thus, the fact that the jury found three aggravating circumstance in this case does not

in any way reduce the likelihood that racial prejudice affected the jury's decision to impose the death sentence.

Finally, respondent invokes the availability of voir dire on the subject of racial bias as a reason to disregard the juror affidavit. Respondent's reliance on the supposed effectiveness of the voir dire is much like arguing that the barn door was closed after the horse has already run away. Whether or not the voir dire in this case was constitutionally sufficient,[1] it is clear that the voir dire did not serve its purpose of eliminating biased jurors. See Turner v. Murray, 476 U.S. at 35-36. Mr. Spencer seeks this Court's review of the issue presented by the presence of biased individuals on his jury.[2] The voir dire is relevant to this issue only insofar as it provides additional evidence that racial prejudice was a factor in Mr. Spencer's

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1 Respondent incorrectly states that "Petitioner here does not complain of any restrictions on voir dire regarding racial bias." Brief in Opposition at 19. In fact, Mr. Spencer's petition to this Court expressly cites the trial court's restriction of voir dire as additional evidence that racial bias affected Mr. Spencer's case. Petition at 17. The trial court improperly restricted Mr. Spencer's voir dire regarding racial bias, thus increasing the risk that racial bias would affect his conviction and sentence, and Mr. Spencer challenged the trial court's restrictions on voir dire on direct appeal as a separately enumerated error as well as a basis for supporting his McCleskey claim.

2 Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986) (if members of petit jury are biased, it is never harmless error); see Ross v. Oklahoma, 108 S. Ct. 2273, 2277 (1988) (had the biased panel member sat, sentence would have to be overturned).

trial. It certainly does not cure the fact that two racially biased jurors made it through the voir dire and permitted racial prejudice to affect their decision to sentence Mr. Spencer to death.[3]

II.

PETITIONER'S BATSON CLAIM
IS NOT PROCEDURALLY DEFAULTED

Mr. Spencer's petition requests that this Court grant certiorari to decide whether the Georgia Supreme Court properly applied this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986). Respondent's opposition does not address the merits of this issue, but instead contends only that Mr. Spencer's Batson claim was procedurally defaulted. Brief in Opposition at 21-27.

Mr. Spencer's petition demonstrated that there was no procedural default because the Batson claim was raised in the trial court and decided on the merits. Petition at 23-27. The procedural "rule" at issue here is the Georgia

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3 Respondent also tries to suggest "that Petitioner has even failed to establish sufficient a [sic] basis under McCleskey which would have warranted any further inquiry into jurors' mental processes." Brief in Opposition at 20. The affidavit submitted by Mr. Spencer, however, fully meets the requirements of this Court's decision in McCleskey. See Petition at 14-15. Moreover, in connection with his motion for new trial, Mr. Spencer filed an omnibus motion seeking further evidence of racial bias on the part of the jury and the District Attorney. R. at 169-78. The trial court denied that motion in its entirety. R. at 672-73.

Supreme Court's finding on appeal that Mr. Spencer's Batson claim was waived despite the fact that (1) Mr. Spencer raised the issue in the trial court, (2) the state did not argue to the trial court that it was waived and (3) the trial court denied the claim on the merits. Respondent does not contend that this "rule" was "firmly established" as required by this Court's decision in Ford v. Georgia, 111 S. Ct. 850 (1991).[4] Respondent instead attempts to avoid the point altogether by misconstruing Mr. Spencer's petition as asserting that the rule in State v. Sparks, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987), was not "firmly established" at the time of Mr. Spencer's trial. See Brief in Opposition at 25. However, the Sparks rule is not at issue here because even respondent concedes that Batson was first raised prior to the time the jurors selected to try the case were sworn. See Brief in Opposition at 21-22.

Respondent also contends that the testimony of Mr. Spencer's trial counsel at the motion for new trial hearing shows that he made a tactical decision not to raise a Batson claim. Brief in Opposition at 23-24. What respondent fails to disclose is that trial counsel's

4 In fact, the procedural rule involved in this case is contrary to the procedural rules in the Uniform Appeals Procedure used in Georgia capital cases as well as the duty the Georgia Supreme Court has assigned itself under these rules. See Newland v. State, 258 Ga. 172, 174, 366 S.E.2d 689, 692, cert. denied, 488 U.S. 975 (1988).

recollection on this matter was demonstrably incorrect. Trial counsel testified that the prosecutor struck as many blacks as whites and, based on this fact, he felt there was no Batson claim. 9/22/88 Tr. at 83. He further testified that if the prosecutor had struck only blacks, he "probably would have" made the motion. 9/22/88 Tr. at 85. In fact, it is undisputed that the prosecutor struck only blacks. R. at 439. Thus, the testimony of Mr. Spencer's trial counsel is ambiguous at best and certainly does not establish a knowing, voluntary and intelligent waiver of Mr. Spencer's Batson claim as required by the Georgia rule in capital cases. Ga. Super. Ct. R. 34.2(B)(2). The trial court was obviously of the same opinion, as it decided the merits of Mr. Spencer's Batson claim after hearing trial counsel's testimony on the subject.[5]

5 Respondent's contention that the Georgia Supreme Court never went to the merits of Mr. Spencer's Batson claim is incorrect. If this were true, there would have been no reason for the court to describe the racial composition of the jury at all.

III.

THERE WAS EVIDENCE TO WARRANT A VOLUNTARY MANSLAUGHTER INSTRUCTION

Mr. Spencer's petition requests that this Court grant certiorari to decide whether the Georgia Supreme Court's decision improperly circumvented this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980). Respondent does not attempt to defend the Georgia Supreme Court's rationale but instead argues that the decision is supported by theories not considered or relied on by the court below.

Respondent first contends that the trial court's refusal to charge on the lesser included offense of voluntary manslaughter was authorized because Mr. Spencer was acting, not from provocation that would reduce the charge to voluntary manslaughter, but "more analogous to self defense" which would entitle the jury to return a verdict of not guilty. Brief in Opposition at 31-32. Respondent's attempt to mischaracterize Mr. Spencer's arguments notwithstanding, Mr. Spencer does not argue here and did not argue below that he should have been acquitted under a theory of self-defense or justification.[6] Instead, Mr. Spencer presented evidence that, although he intentionally shot Mr. Williams, he did not do so with

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6 See Brief of Appellant to the Supreme Court at Georgia at 136 n.50.

malicious intent but instead acted because of a "sudden passion" resulting from "serious provocation." Those facts support a finding of voluntary manslaughter under Georgia law. Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982); see Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986) (charge of voluntary manslaughter must be given if there is any evidence, however slight, supporting the charge); cf. Saylors v. State, 251 Ga. 735, 736-37, 309 S.E.2d 796, 797-98 (1983) (defense was justification rather than provocation only where defendant admitted in his testimony that he acted in self-defense). Mr. Spencer has always contended that he acted out of fear and panic which resulted from Mr. Williams' lunge for the loaded .357 Magnum pistol on the front dashboard of the vehicle. See Petition at 31-34. The evidence submitted at trial does not show self-defense, and the jury was not charged on a self-defense theory of justification. Cf. Coleman v. State, 256 Ga. at 307, 348 S.E.2d at 633 (defendant need not show that he was acting in self-defense in order to support a finding of voluntary manslaughter).

Respondent next argues that voluntary manslaughter under Georgia law requires verbal threats accompanied by provocative conduct. This novel interpretation of Georgia law is not supported by the case law. Provocation can be conduct, or words and conduct together, that creates fear of

immediate danger in a reasonable man. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838. The fear engendered by danger is sufficient provocation to excite the passion necessary for voluntary manslaughter. Thomas v. State, 184 Ga. App. 131, 132, 361 S.E.2d 21, 23 (1987). "While a belief that the victim was about to reach for a weapon may not result in a finding of justification [self-defense], the fear of some danger can be sufficient provocation to excite passion." Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

The collection of cases respondent relies on shows -- at most -- that words alone may not be sufficient provocation for voluntary manslaughter. Hambrick v. State, 256 Ga. 688, 688-89, 353 S.E.2d 177, 179 (1987) (holding that it was error for the trial court to charge that provocation by words or gestures alone is always inadequate to reduce murder to manslaughter); Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986) (reversing conviction for trial court's refusal to charge voluntary manslaughter where evidence showed that victim had attacked defendant with a butcher knife); Hunter v. State, 256 Ga. 372, 373, 349 S.E.2d 389, 389 (1986) ("appellant showed no provocative conduct on behalf of the intended victim of the appellant's shot except for a salvo of curse words directed at the

appellant"); Veal v. State, 250 Ga. 384, 385, 297 S.E.2d 485, 486 (1982) ("The evidence in the present case shows only angry words, unconnected to any threat or provocative conduct. . . ."); Huston v. State, 256 Ga. 276, 278, 347 S.E.2d 556, 558 (1986) ("There were no threats or provocative conduct of any kind by the victim. . . ."). These cases do not, as respondent suggests, establish the opposite principle -- that provocative conduct is not sufficient to support a voluntary manslaughter charge.[7]

Finally, respondent attempts to distinguish this Court's grant of certiorari in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari), to decide whether a state court can avoid the effect of Beck by failing to recognize the existence of any lesser-included offense under state law. In the decision below, the Georgia Supreme Court conceded that there was evidence in the record showing that Mr. Spencer acted out of fear and panic, thereby supporting a charge of voluntary manslaughter under Georgia law. Nonetheless, the Georgia Supreme Court sua sponte reinterpreted Georgia's voluntary manslaughter statute to hold that provocation could not exist as a matter of law because the shooting of Lett Williams occurred in the course

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7 In any event, there is evidence that, just before Mr. Williams lunged into car for the loaded gun on the desk, Mr. Beazley told Mr. Williams (in a voice loud enough to be heard by Mr. Spencer) to "[g]et the gun and help me." R. at 924-26.

of an escape attempt. Having ruled as a matter of law that there was no legal provocation, the Georgia Supreme Court could then circumvent this Court's decision in Beck by simply concluding that "the evidence fails to warrant such a charge." Appendix at a6, 260 Ga. at 643, 398 S.E.2d at 184. Thus, contrary to the situation in Hopper v. Evans, 456 U.S. 605 (1982), there was evidence in the case to support the charge of voluntary manslaughter, but under the Georgia Supreme Court's new statutory interpretation that evidence was deemed irrelevant as a matter of law. The state courts must not be permitted to redefine substantive criminal law on a case-by-case basis for the purpose of eroding the constitutional protections of Beck.

IV.

PETITIONER ARGUED BELOW THAT THE TRIAL COURT'S EXCLUSION OF RELEVANT MITIGATING EVIDENCE WAS FEDERAL CONSTITUTIONAL ERROR

Mr. Spencer's petition requests that this Court grant certiorari to consider whether the trial court's denial of a continuance and consequent exclusion of relevant mitigating evidence violated Mr. Spencer's Eighth Amendment or due process rights. Petition at 37-44. Respondent contends that the Court should not consider this issue because the Georgia Supreme Court did not reach the federal questions. Brief in Opposition at 37.

Respondent does not deny that Mr. Spencer properly raised the federal constitutional questions in the state court.[8] Under the "not pressed or passed upon" rule, this Court will refuse to consider a claim only if it was neither raised nor squarely considered and resolved in state court. Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983) (citing McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940), and State Farm Mut. Automobile Ins. Co. v. Duel, 324 U.S. 154, 160 (1945)). Since there is no dispute that Mr. Spencer raised the federal questions in the state court and that these claims were denied, they may properly be considered by this Court.

8 Mr. Spencer listed the federal questions as enumerations of error and fully briefed and argued them to the trial court and to the Georgia Supreme Court. R. at 738-39; Brief of Appellant to the Supreme Court of Georgia at 246-56.

Dated: May 13, 1991

Respectfully submitted,

Charles L. Kerr*
Ann M. Parrent
Laura Hastings
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

-and-

John P. Batson
303 10th Street
Augusta, Georgia 30901
(404) 722-8191

Attorneys for Petitioner
James Lee Spencer

* Counsel of Record

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CERTIFICATE OF SERVICE

I, CHARLES L. KERR, a member of the Bar of this Court and counsel of record for Petitioner in the above-entitled matter, hereby certify that on May 13, 1991, in compliance with Supreme Court Rule 29.3, one copy of the Petitioner's Reply Brief In Support of His Petition For a Writ of Certiorari to the Supreme Court of Georgia, was mailed first-class, postage prepaid, to each of the following counsel for Respondent:

Richard E. Thomas
Chief Assistant District Attorney
Augusta Judicial Circuit
401 Walton Way
Suite 2121
Augusta, Georgia 30911-2121

Paula K. Smith
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

I further certify that all parties required to be served have been served.

Dated: New York, New York
May 13, 1991

Charles L. Kerr
(Counsel of Record)
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

Attorneys for Petitioner